Docket: 2018-4365(IT)G

BETWEEN:

MARIE BOUCHARD,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Written motion of the Respondent filed on March 21, 2023, pursuant to rule 172 of the *Tax Court of Canada Rules (General Procedure)* following the judgment of dismissal resulting from the filing of a Notice of Discontinuance

Parties:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Vlad Zolia

JUDGMENT

UPON READING the Notice of Motion filed by the Respondent on March 21, 2023, the Respondent's written submissions attached in support of the motion, and the Appellant's written submissions dated June 11, 2023, and July 11, 2023:

THIS COURT ORDERS, in accordance with the attached reasons, as follows:

a. The Respondent's motion is granted to amend the dismissal of the Notice of Appeal pursuant to section 16.2 of the *Tax Court of Canada Act*;

b. To this end, the Appellant's appeal is allowed in part, and the assessment in issue is referred back to the Minister of National Revenue for reconsideration and reassessment for the sole purpose of addressing the

Respondent's admission as regards reducing by $19,402.10 the amount assessed pursuant to subsection 160(1) of the *Income Tax Act* in this appeal;

c. Without costs.

Signed at Montréal, Quebec, this 4th day of August 2023.

"J.M. Gagnon"

Gagnon J.

Translation certified true
on this 19th day of September 2023.

Melissa Paquette, Jurilinguist

Citation: 2023 TCC 113
Date: 20230804
Docket: 2018-4365(IT)G

BETWEEN:

MARIE BOUCHARD,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Gagnon J.

[1] The Appellant filed a Notice of Discontinuance of her appeal on February 22, 2023, prior to the scheduled hearing date for a motion brought by the Respondent on September 26, 2022. The Court Registry processed the discontinuance in accordance with the provisions of subsection 16.2(2) of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, as amended (the "**Act**"). Accordingly, said motion was not addressed.

[2] On March 21, 2023, the Respondent filed a new written motion pursuant to rule 172 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688, as amended (the "**Rules**"), in order to obtain a decision ordering the Minister of National Revenue to amend the Notice of Assessment under appeal following an admission by the Respondent and despite the Appellant's discontinuance.

[3] The Appellant objects to the Respondent's motion.

[4] The Respondent's position is that on September 26, 2022, he filed a Notice of Motion pursuant to rules 4, 64, 65, 69, and 170.1 of the Rules. This motion to dismiss the appeal mentioned a request that the Minister of National Revenue be ordered to reduce the assessment in issue made against the Appellant pursuant to subsection 160(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (the "**ITA**"), from $390,022 to $370,619.90, or by $19,402.10. As attached to the

Notice of Motion, this partial concession was the result of an error discovered by the Respondent at the time of preparing the examination for discovery. This error was brought to the Appellant's attention and would allegedly result in a $19,402.10 reduction in the assessment under appeal.

[5] The hearing of the Respondent's motion to dismiss the appeal was scheduled for March 6, 2023. However, on February 22, 2023, the Appellant filed with the Court Registry a Notice of Discontinuance, which was accepted by the Respondent without costs on February 27, 2023. The Respondent's acceptance requested that the Court consider his admission described above. The current motion was brought in response to that request.

[6] The Respondent is of the view that the Court did not have the opportunity to decide on the Respondent's admission. The admission is contained in the Court file and is directly related to the matter at issue. The Respondent suggests that paragraph 172(1)(b) of the Rules allows the Court to intervene. The Respondent refers the Court to the Federal Court of Appeal decision in *Scarola v. Canada*, 2003 FCA 157 ("***Scarola***").

[7] The Appellant has not been represented since February 3, 2020. On May 9, 2023, she sent the Court a letter addressed to counsel for the Respondent, and written submissions on June 11, 2023, addressed to the Court in response to the Respondent's motion of March 21, 2023. Although the written submissions refer to a motion, the Court understands that this is the Appellant's position in response to the Respondent's motion. There is no other motion before the Court; rather, the Court has before it a single motion in respect of which the Court has obtained each party's position. Lastly, the Appellant sent the Court a final message on July 11, 2023, requesting a final decision on the Respondent's motion.

[8] After explaining the circumstances surrounding the history of this file, the Appellant respectfully submits that, as a result of the discontinuances of both parties, the Court no longer has jurisdiction to grant a reduction of the debt of her former spouse and not the Appellant's debt. The Appellant has apparently never been assessed, and therefore, a notice of appeal was allegedly not required. For the Appellant, the Court file is closed. The taxation authorities are seeking to obtain payment of a debt that is not her own.

[9] For the purposes of considering the Respondent's current motion, the Court notes from the Appellant's position that the Court has not had jurisdiction since the Appellant filed a Notice of Discontinuance of her Notice of Appeal with the Court

Registry. Accordingly, the Appellant is of the view that the Court does not have the authority to grant the Respondent's requests.

[10] In this case, the discontinuance of the Notice of Appeal filed by the Appellant on February 22, 2023, and processed by the Court Registry as such is subject to the provisions of section 16.2 of the Act:

> Discontinuance
>
> 16.2 (1) A party who instituted a proceeding in the Court may, at any time, discontinue that proceeding by written notice.
>
> Effect of discontinuance
>
> (2) Where a proceeding is discontinued under subsection (1), it is deemed to be dismissed as of the day on which the Court receives the written notice.

[11] In view of section 16.2 of the Act, the Registry processed the Appellant's Notice of Discontinuance by terminating the Appellant's appeal, without costs. This process did not require the issuance of a judgment of the Court, and the Court did not have to decide on the Respondent's motion filed on September 26, 2022, asking the Court to, in particular, consider in this case a $19,402.10 reduction in the assessment under subsection 160(1) of the ITA.

[12] The Federal Court of Appeal's decision in *Scarola* is a landmark case with respect to determining the effect and scope of section 16.2 of the Act and the application of rule 172 of the Rules in respect of dismissals pursuant to section 16.2.

[13] In *Scarola*, the Federal Court of Appeal describes the effect and scope of section 16.2 and introduces rule 172 of the Rules as follows:

> The scope and effect of section 16.2 of the Act
>
> [19] Section 16.2 of the Act is a deeming provision which creates a legal fiction. In the words of Beetz J. in *R. v. Verrette*, 1978 CanLII 208 (SCC), [1978] 2 S.C.R. 838, at 845, "[a] deeming provision is a statutory fiction; as a rule it implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing although it is not or there is doubt as to whether it is."
>
> [20] …

> [21] An appeal discontinued is, pursuant to subsection 16.2(2), an appeal dismissed. An appeal dismissed is an appeal disposed of, and an appeal which has been disposed of no longer exists: see *Lehner v. M.N.R.*, 1997 CanLII 4994 (FCA), [1997] 2 C.T.C. 309 (F.C.A.), at paragraph 2 per Pratte J.A. Subsection 16.2(2) operates to turn the filing of a discontinuance into a constructive dismissal akin to an actual dismissal. In other words, the discontinuance of an appeal, as a result of that subsection, takes on all of the properties of a dismissal. It produces the same effect as a judgment of dismissal by the Court, albeit that effect is obtained by sheer operation of the legal fiction. In either case, the powers of the Court are spent: the decision maker is *functus officio*. A dismissal, deemed or actual, is a final determination which closes the matter, barring some vitiating circumstances such as fraud or some statutory authority allowing the decision maker to retain or recapture the lost authority.
>
> [22] Section 172 [as am. by SOR/96-503, s. 4] of the *Tax Court of Canada Rules (General Procedure)* [SOR/90-688], often referred to as the "slip" rule, provides such authority. It allows the Court to set aside, vary or amend judgments when the conditions provided therein are met: ...
>
> [Emphasis added.]

[14] In the same decision, the Federal Court of Appeal added, on the subject of allowing the application of rule 172 of the Rules to discontinuances contemplated by section 16.2 of the Act, the following:

> [24] As is often the case with legal fictions, they do not integrate well or fully with other existing relevant legislation. Necessary adjustments are sometimes needed to fill gaps or obviate disparities or potential injustices. Section 172 gives the Court jurisdiction to vary or set aside any of its judgments, including a judgment of dismissal. As previously mentioned, the legal fiction turns a discontinuance into a dismissal. Such dismissal carries the same effect as a judgment of dismissal by the Court. It is, indeed, tantamount to a judgment of dismissal on consent.
>
> [25] For the purpose of allowing the limited remedial provisions of section 172 to apply, I am willing to give full and consistent effect to the legal fiction created by subsection 16.2(2) and to fill the gap created by the wording of the subsection and of section 172. I do not think that it does violence to Parliament's intent to find that the dismissal under subsection 16.2(2) ought to be treated as a judgment of dismissal to which section 172 will apply if and when the conditions are met.
>
> [Emphasis added.]

[15] From these excerpts, the Court concludes that the Federal Court of Appeal is confirming the Court's authority to intervene in the judgment of dismissal of the

appeal in this case following the Appellant's discontinuance, provided that the conditions for the application of rule 172 of the Rules are met.

[16] In view of the foregoing, and notwithstanding the effect of the Appellant's Notice of Discontinuance for the purposes of her Notice of Appeal, the Court retains its jurisdiction for the specific purpose of considering and deciding on a motion of a party filed pursuant to rule 172 of the Rules. It is not a question of the Court reopening the Appellant's Notice of Appeal, but of it being able to consider an amendment or a change to the outcome that resulted from the dismissal of the Notice of Appeal, in accordance with and within the permitted framework of rule 172 of the Rules.

[17] Rule 172 of the Rules reads as follows:

> Setting Aside, Varying or Amending Accidental Errors in Judgments — General
>
> 172(1) A judgment that,
>
> (a) contains an error arising from an accidental slip or omission, or
>
> (b) requires amendment in any matter on which the Court did not adjudicate,
>
> may be amended by the Court on application or of its own motion.
>
> (2) A party who seeks to,
>
> (a) have a judgment set aside or varied on the ground of fraud or of facts arising or discovered after it was made,
>
> (b) suspend the operation of a judgment, or
>
> (c) obtain other relief than that originally directed,
>
> may make a motion for the relief claimed.

[18] The direct effect of subsection 16.2(2) of the Act in this case is that the Court did not have to intervene or even issue a judgment given the legal fiction that applies without further formality of the Court. The Court notes that it therefore did not have to decide on any aspect of the Respondent's motion filed on September 26, 2022. In this context, but without formally excluding the other provisions of rule 172 of the Rules, the Court prefers to rely on paragraph 172(2)(c) to dispose of the Respondent's motion.

[19] Paragraph 172(2)(c) of the Rules, combined with the Federal Court of Appeal's comments in *Scarola*, opens the door to relief that is different from that already granted by the Act, without the paragraph itself limiting the scope of that relief to a judgment coming from the Court or arising from the legal fiction created by section 16.2 of the Act. In other words, paragraph 172(2)(c) applies regardless of the origin of the judgment.

[20] In addition, the openness of the Federal Court of Appeal noted above to give full and consistent effect to the legal fiction created by subsection 16.2(2) of the Act and to fill the gap created by the wording of that subsection and rule 172 of the Rules thus integrates and aligns further to allow the Court to intervene pursuant to paragraph 172(2)(c) in the context of a judgment of dismissal. Here, the Court refers to the Federal Court of Appeal's statements reflected in paragraph 14 of the reasons.

[21] It must be specified that if a judgment taking effect or not pursuant to the provisions of subsection 16.2(2) of the Act can be amended under rule 172 of the Rules, the judgment will necessarily be adapted to reflect the action taken by the Court. In such a case, a judgment of dismissal cannot remain unchanged.

[22] The Court is of the view that paragraph 172(2)(c) of the Rules is applicable to the Notice of Motion as filed by the Respondent. The motion for relief from the deemed judgment of section 16.2 of the Act will be granted. In the circumstances of this case, addressing the motion does not constitute a disregard for the administration of justice. It seems fair and desirable to address the Respondent's admission as regards reducing the amount of the assessment under appeal. The Respondent's admission as regards reducing the amount of the assessment in issue was known to the parties prior to the date of the Notice of Discontinuance filed by the Appellant; the Respondent had already expressed, prior to that date, the willingness that this admission be considered by the Court and that the resulting effects be granted to the Appellant.

[23] In view of the foregoing, the Court orders that the judgment rendered as a result of the dismissal of the Appellant's Notice of Appeal pursuant to section 16.2 of the Act be amended so that the appeal filed by the Appellant will be partially allowed for the sole purpose of referring this matter back to the Minister of National Revenue for reconsideration and reassessment in order to address the Respondent's partial admission and reduce by $19,402.10 the assessment under subsection 160(1) of the ITA, without costs.

Signed at Montréal, Quebec, this 4th day of August 2023.

"J.M. Gagnon"

Gagnon J.

Translation certified true
on this 19th day of September 2023.

Melissa Paquette, Jurilinguist

CITATION:	2023 TCC 113
COURT FILE NO.:	2018-4365(IT)G
STYLE OF CAUSE:	MARIE BOUCHARD AND HIS MAJESTY THE KING
REASONS FOR JUDGMENT BY:	The Honourable Justice Jean Marc Gagnon
DATE OF JUDGMENT:	August 4, 2023

PARTIES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Vlad Zolia

COUNSEL OF RECORD:

For the Respondent:	Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Canada